



BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

NATURAL RESOURCES DEFENSE
COUNCIL,

Appellant.

NOTICE OF APPEAL OF YOLO COUNTY'S APPROVAL OF THE OLD SUGAR MILL SPECIFIC PLAN AND RELATED ACTIONS

and

STATEMENT OF REASONS IN
SUPPORT THEREOF

Hearing: November 16, 2006
6:30 p.m.

Deborah S. Reames
Gregory C. Loarie
Earthjustice
426 17th Street, 5th Floor
Oakland, CA 94612

Counsel for Appellant
Natural Resources Defense Council

FILED
Date: NOV - 3 2006

TABLE OF CONTENTS

NOTICE OF APPEAL.....	1
PARTIES	1
THE DELTA PROTECTION ACT	2
BACKGROUND	4
STATEMENT OF REASONS FOR APPEAL.....	5
I. The Plain Language of the Delta Protection Act and Its Legislative History Reveal that the Old Sugar Mill Project Is Located within the Primary Zone of the Delta.	5
II. The Old Sugar Mill Project Is in Direct Conflict with the Delta Protection Act.....	8
A. The Old Sugar Mill Project Constitutes “Development” Subject to the Delta Protection Act.....	8
B. The Delta Protection Act Mandates that Development be Approved Only If Consistent with the Act and Resource Management Plan, a Requirement the Old Sugar Mill Project Fails to Meet.	10
1. The Old Sugar Mill Project Includes Wholly New Sewage Treatment Facilities in Violation of Utilities and Infrastructure Policy P-3.....	10
2. The Project Authorizes New Urban Development and New Infrastructure in the Primary Zone in Violation of Land Use Policies P-2, P-3 and P-4 and Agricultural Policy P-4.....	12
3. The Project Exposes the Public to Increased Flood Hazard in Violation of Levee Policies P-1 through P-5.	16
CONCLUSION.....	19

NOTICE OF APPEAL

Pursuant to Public Resources Code section 29770(a) and California Code of Regulations, Title 14, sections 20001-03, the Natural Resources Defense Council ("NRDC") hereby appeals to the Delta Protection Commission the County of Yolo's October 24, 2006 approval of the Old Sugar Mill Specific Plan and related actions (collectively, the "Old Sugar Mill Project" or "Project"). As set forth below, the Old Sugar Mill Project calls for significant residential development within the Primary Zone of the Sacramento-San Joaquin Delta ("Delta") that is inconsistent with both the Johnston-Bakar-Andal-Boatwright Delta Protection Act of 1992 ("Delta Protection Act"), Pub. Resources Code §§ 29700-80, and the Delta Protection Commission's Resource Management Plan for the Primary Zone. Accordingly, NRDC requests that the Delta Protection Commission remand Yolo County's approval of the Old Sugar Mill Project for reconsideration. Pursuant to California Code of Regulations, Title 14, section 20008(a), the Delta Protection Commission shall consider this appeal at its next regularly scheduled meeting on November 16, 2006 at 6:30 p.m. at the Walnut Grove Community Presbyterian Church - Koinonia Hall, 14120 Grand Avenue, Walnut Grove, California.

PARTIES

Appellant Natural Resources Defense Council

NRDC is a non-profit environmental organization with more than 525,000 members nationwide, including more than 97,000 members in California and thousands of members who are residents and taxpayers in the counties in and around the Delta. NRDC's purposes include protecting America's natural resources, maintaining and enhancing environmental quality and monitoring governmental actions to ensure that laws enacted to protect the environment are fully and properly implemented. NRDC is headquartered in New York, NY, but maintains an office in San Francisco at 111 Sutter Street, 20th Floor, San Francisco, California 94104.

NRDC has long devoted considerable attention to the protection and restoration of the Delta. The Delta is the hub of the State's aquatic ecosystem, a vital component in its fishing and agricultural economies, and the source of drinking water for over 20 million Californians. NRDC does not typically address local land use matters; however, the Old Sugar Mill Project raises issues with broad policy implications for the entire Delta, particularly regarding the wisdom of allowing new residential development in vulnerable floodplains. This is especially troubling given that the State is facing the triple threat of inadequate flood protection for vast

swaths of the existing residential and infrastructure development in the Delta, global climate change that will exacerbate those flood threats, and a collapsing Delta ecosystem.

Local Governmental Body Yolo County

The County of Yolo is the local governmental body whose action – *i.e.*, approval of the Old Sugar Mill Project – is the subject of this appeal.

Third-Party Project Applicant Clarksburg Investment Partners.

Clarksburg Investment Partners, LLC and 44 Willow Point, LLC are the third-parties whose development proposal – *i.e.*, the Old Sugar Mill Project – is the subject of this appeal. They maintain an office at 35265 Willow Ave., P.O. Box 488, Clarksburg, California 95612.

THE DELTA PROTECTION ACT

The Delta Protection Act of 1992 finds and declares that “[t]he [D]elta is an agricultural regional of great value to the state and nation” and that “the continued dedication and retention of that delta land in agricultural production contributes to the preservation and enhancement of open space and habitat values.” Pub. Resources Code § 29703. The statute further finds that “the [D]elta is inherently a floodprone area wherein the most appropriate land uses are agriculture, wildlife habitat, and, where specifically provided, recreational activities.” *Id.* at § 29704. “In order to protect regional, state, and national interests in the long-term agricultural productivity, economic vitality, and ecological health of the delta resource,” the Delta Protection Act declares that “it is important that there be a coordination and integration of activities by the various agencies whose land use activities and decisions cumulatively impact the delta.” *Id.* at § 29709(b).

The mechanics of the Delta Protection Act reflect the Legislature’s judgment that “regulation of land use and related activities that threaten the integrity of the Delta’s resources can best be advanced through comprehensive regional land use planning implemented through reliance on local government in its local land use planning procedures and enforcement.” *Id.* at § 29709(a). Thus, the statute establishes a 19-member Delta Protection Commission, and it directs the Commission to adopt a “comprehensive long-term resource management plan for land uses within the Primary Zone of the Delta.” *Id.* at §§ 29735, 29760(a).

The “Primary Zone” is statutorily defined as comprising “delta land and water area of primary state concern and statewide significance which is situated within the boundaries of the delta.” *Id.* at § 29728. According to the Delta Protection Act, “[t]he precise boundary lines of

the Primary Zone includes the land and water areas as shown on the map titled ‘Delta Protection Zones’ on file with the State Lands Commission.” *Id.* That map is attached hereto as Exhibit A.

“Within 180 days from the date of the adoption of the resource management plan” by the Delta Protection Commission, the Delta Protection Act requires each “local government”¹ to submit to the Commission proposed amendments to its general plan. *Id.* at § 29763. With respect to land located within the Delta primary zone, the proposed amendments must cause the local government’s general plan – and any “development”² approved or proposed that is consistent with the general plan – to be consistent with the resource management plan and 10 additional statutory criteria. *Id.* at § 29763.5. For example, the statutory criteria require the local government to ensure that its general plan will not result in wetland or riparian loss, degrade water quality, expose the public to increased flood hazard, or adversely impact agricultural lands. *Id.* at § 29763.5(b)-(c), (g)-(h).

If the Delta Protection Commission determines that a local government’s general plan amendment is indeed consistent with the Resource Management Plan and the specified statutory criteria, then it must approve the amendment within 60 days. *Id.* at § 29763.5. The local government must then formally adopt the general plan amendment within 120 days after the Commission’s approval. *Id.* at § 29763.8. “Prior to the [Delta Protection] Commission approving the general plan amendments of the local government,” the Delta Protection Act provides that the local government may approve “development” within the primary zone only after making written findings, based on substantial evidence, that the development is consistent with the same 10 statutory criteria also enumerated in Section 29763.5. *Id.* at § 29765.

Finally, the Delta Protection Act provides that “[a]ny person who is aggrieved by any action taken by a local government or other local agency in implementing the resource

¹ The term “local government” is defined as the “Counties of Contra Costa, Sacramento, San Joaquin, Solano, and Yolo, and the Cities of Sacramento, Stockton, Tracy, Antioch, Pittsburg, Isleton, Lathrop, Brentwood, Rio Vista, West Sacramento, and Oakley, and any other cities that may be incorporated in the future in the primary zone.” Pub. Resources Code § 29725.

² “Development” is defined broadly to include “the placement or erection of any solid material or structure . . . on, in, over, or under land or water,” *id.* at § 29723(a), but it excludes certain specified activities, including “construction, reconstruction, demolition, and land divisions within existing zoning entitlements, and development within, or adjacent to, the unincorporated towns of the delta, as permitted by in the Delta Area Community Plan of Sacramento County and the general plan of Yolo County, authorized prior to January 1, 1992.” *Id.* at § 29723(b)(9).

management plan, or otherwise taken pursuant to this division, may file an appeal with the [Delta Protection] Commission.” *Id.* at § 29770(a). According to the Act,

The ground for the appeal and the [Delta Protection Commission’s] consideration of the appeal shall be that an action, as to land located exclusively within the primary zone, is inconsistent with the resource management plan, the approved portions of local government general plans that implement the resource management plan, or this division.

Id. A proposed action that is appealed to the Delta Protection Commission “shall not be effective until the Commission has adopted written findings, based on substantial evidence in the record, that the action is consistent with the resource management plan, the approved portions of local government general plans that implement the resource management plan, and this division.”

Id. at § 29771.

BACKGROUND

On February 23, 1995, the Delta Protection Commission adopted the Land and Resource Management Plan for the Primary Zone of the Delta (“Resource Management Plan”). It is NRDC’s understanding that shortly thereafter Yolo County proposed to make its general plan -- which incorporates the Clarksburg general plan -- consistent with the Resource Management Plan, as required by Public Resources Code section 29763. The Delta Planning Commission approved Yolo County’s general plan amendment on October 26, 1995, and Yolo County formally adopted the amendment in March 1997.

In July 2002, Clarksburg Investment Partners, LLC applied to Yolo County for approval to construct the Old Sugar Mill Project on a 105-acre parcel near the unincorporated community of Clarksburg. *See* Old Sugar Mill Specific Plan (Oct. 24, 2006) (“Specific Plan”) at 1-1. The parcel is the former site of the Clarksburg sugar mill, which was built in 1934 to process sugar beets but ceased operations in 1993. Up until last month, the parcel was zoned M-2, Heavy Industrial. Specific Plan at 1-6. The Old Sugar Mill Project site is adjacent to Sacramento River and directly behind a levee composed of coarse, sandy soils dredged from the river channel nearly a century ago. The surrounding area, to the north and west, consists of farmland and vineyards. *Id.* at 1-2.

According to the recirculated draft environmental impact report (“RDEIR”) for the Old Sugar Mill Project, the Project will include a mix of up to 162 residential units concentrated in the southern portion of the site. RDEIR at 2.1-15. Construction of these 162 units will more

then double the number of existing residences in Clarksburg and thereby far exceed the 1.8 percent annual growth rate established previously in the Clarksburg general plan. *Id.* To accommodate these residences, the Old Sugar Mill Project will construct a new wastewater sewage facility in the northern portion of the site, “which will be sized to handle a design flow of 90,000 gallons of wastewater per day.” *Id.* at 2.1-42. “[G]iven uncertainties regarding the Sacramento River levee system’s performance during a modeled 100 year flood event,” the County concedes that “the project site’s 100-year flood certification is in question.” *Id.* at 2.4-40. Indeed, the County admits that the risk of levee failure in the Project area is “unavoidable.” Specific Plan at MMP-35.

The Yolo County Board of Supervisors gave final approval to the Old Sugar Mill Project on October 24, 2006. The Board of Supervisors adopted the final environmental impact report (“FEIR”) for the Project, a resolution approving the Old Sugar Mill Specific Plan and design guidelines, a resolution amending the general plan to increase the allowable annual growth rate, an ordinance rezoning the Project site from “Heavy Industrial” to “Sugar Mill Combining Zone,” and an ordinance approving a development agreement with Clarksburg Investment Partners, LLC and 44 Willow Point, LLC. This appeal followed.

STATEMENT OF REASONS FOR APPEAL

The Delta Protection Act provides that “any person who is aggrieved by any action taken by a local government . . . may file an appeal with the Commission” on the grounds that the “action, as to land located exclusively within the Primary Zone, is inconsistent with the resource management plan, the approved portions of local government general plans that implement the resource management plan, or this division [*i.e.*, the Delta Protection Act].” Pub. Resources Code at § 29770(a). As detailed below, the Old Sugar Mill Project is located exclusively within the Primary Zone and is inconsistent with both the Resource Management Plan adopted by the Delta Protection Commission in 1995 and the Delta Protection Act. Accordingly, the Old Sugar Mill Project must be remanded to Yolo County for reconsideration. *Id.* at § 29771.

I. The Plain Language of the Delta Protection Act and Its Legislative History Reveal that the Old Sugar Mill Project Is Located Within the Primary Zone of the Delta.

As discussed above, the Delta Protection Act defines the Primary Zone of the Delta to include:

[T]he delta land and water area of primary state concern and statewide significance which is situated within the boundaries of the Delta . . . but that is not within either the urban limit line or sphere of influence line of any local government's general plan or currently existing studies, as of January 1, 1992. The precise boundary lines of the primary zone includes the land and water areas as shown on the map titled "Delta Protection Zones" on file with the State Lands Commission.

Pub. Resources Code § 29728.

There is no question that the Old Sugar Mill Project falls entirely within the Primary Zone as depicted by the Delta Protection Zones map. *See, e.g.*, RDEIR at 2.1-62 (stating that the Old Sugar Mill Project "is indisputably located within the shaded area of the Primary Zone as it appears on the Delta Protection Zone map"). Accordingly, Yolo County has acknowledged repeatedly in the past that the Old Sugar Mill Project is located within the Primary Zone. *See, e.g.*, Draft Old Sugar Mill Specific Plan EIR (Aug. 2004) ("DEIR") at 4.1-7 ("The [Old Sugar Mill Project] is located within the Primary Zone of the Sacramento-San Joaquin Delta, as defined by [section] 29728 of the Delta Protection Act").

Nevertheless, Yolo County now maintains that the Old Sugar Mill Project falls not only within the Primary Zone as delineated by the Delta Protection Zones map, but also within the urban limit line identified in the Clarksburg general plan – which is incorporated into the Yolo general plan – as of January 1, 1992. *See* RDEIR at 2.1-62. Since the term "local government" includes Yolo County, *see* Pub. Resources Code § 29728, the RDEIR for the Old Sugar Mill Project asserts that "the official map appears to conflict with the exclusionary language in the first sentence of section 29728." RDEIR at 2.1-62. Thus, Yolo County now concludes that it is "unclear" whether the Old Sugar Mill Project is indeed located within the Primary Zone. *Id.* at 2.1-60.

To resolve this apparent inconsistency in the definition of the Primary Zone, NRDC submits that the official Delta Protection Zones map – which was before the Legislature when the Delta Protection Act was enacted – must trump the textual description of the Primary Zone in the first sentence of Section 29728 of the Act. As an initial matter, the plain language of the Delta Protection Act states that the Delta Protection Zones map delineates "the precise boundary lines of the Primary Zone." Pub. Resources Code § 29728 (emphasis added). The legislative history of the Act likewise supports this conclusion. For example, an early summary of the bill that became the Delta Protection Act, prepared by the subcommittee with jurisdiction over the

bill, stated that the legislation “establishes a map-defined Primary Zone within the core of the Delta.” Subcomm. on San Joaquin/Sacramento Delta Protection of Senate Comm. on Natural Resources and Wildlife, “Summary of SB 1866 (Johnston) – Delta Protection Act 1992” (emphasis added) (Exhibit B hereto).

Furthermore, while the language in the first sentence of Section 29728 suggests that the Primary Zone does not encompass land within county urban limit lines, the legislative history of the Delta Protection Act indicates that this is not what the Legislature had in mind. Rather, the Legislature intended to exclude from the Primary Zone only land within city urban limit lines. For example, in a letter to then-Governor Pete Wilson urging him to sign the Delta Protection Act, the principal author of the Delta Protection Act, Senator Patrick Johnston, explained:

The Primary Zone is that area which local incorporated cities have not staked out for future development. The Primary Zone line was drawn only after extensive consultations were held with all cities within the Delta and their general plans were reviewed to determine their urban limit lines or spheres of influence (see attached Map).

Letter from Sen. Johnston to Gov. Wilson (Sept. 2, 1992) at 3 (emphasis added) (Exhibit C hereto). Senator Johnston’s description of the Primary Zone therefore comports with the area delineated by the official Delta Protection Zones map, which similarly reflects only incorporated city urban limit lines. *See also* Letter from Sen. Johnston to Mayor Canciamilla (Mar. 5, 1992) at 1 (“Specifically, the bill excludes from any land use controls the areas in general plans or sphere of influence of the City of Pittsburg or any other incorporated city.”) (Exhibit D hereto); Letter from Sen. Johnston to League of Cal. Cities (Aug. 13, 1992) at 1 (explaining that the Act “creates a Primary Zone . . . that respects all of the Delta cities’ general plans and their concomitant spheres of influence”) (Exhibit E hereto).

The issue of inconsistencies in the Delta Protection Act’s definition of “Primary Zone” was brought to the attention of the Attorney General in 1994 – over a decade ago. After analyzing the statute, the Attorney General advised the Delta Protection Commission:

[W]e conclude that where there exists a conflict between the various criteria contained in Section 29728 designating the boundaries of the Primary Zone, the Commission is required to rely specifically on the boundary lines shown on the “Delta Protection Zones” map currently on file with the Secretary of State.

Memorandum from Deputy Atty. General Frank to Delta Protection Commission (Nov. 30, 1994) at 2 (Exhibit G hereto).³

Consistent with this interpretation, Delta Protection Commission staff have consistently – and correctly – taken the position that the Old Sugar Mill Project is located within the Primary Zone of the Delta. *See, e.g.*, Letter from former Delta Protection Commission Executive Director Margit Aramburu to the County at 2 (Oct. 25, 2004) (“The [Sugar Mill site] is located within the Primary Zone of the Delta.”) (Exhibit H hereto); Letter from Executive Director Linda Fiack to Yolo County Planning Department (Dec. 12, 2005) (“[I]t continues to be the position of the Commission, pursuant to consultation with the Office of the State Attorney General, that the subject project is within the Primary Zone and is therefore subject to consistency with the Plan and the Act”) (Exhibit I hereto). Even the Resource Management Plan itself states that “[u]nincorporated communities lie along the Sacramento River in the Primary Zone including: Clarksburg . . .”. Resource Management Plan at 6.

In short, the plain language and the legislative history of the Delta Protection Act compel the conclusion that precise boundary of the Primary Zone is delineated by the Delta Protection Zone’s map, which clearly shows that the Old Sugar Mill Project is within the Primary Zone.

II. The Old Sugar Mill Project Is in Direct Conflict with the Delta Protection Act.

A. The Old Sugar Mill Project Constitutes “Development” Subject to the Delta Protection Act.

Yolo County’s conclusion that the Old Sugar Mill Project is not “development” subject to the requirements of the Delta Protection Act, *see* RDEIR at 2.1-66, is not supported by the law or the facts. In reaching this conclusion, County Counsel relies on Section 29723(b)(9), which creates a narrow exception to the Act’s broad definition of the activities that constitute “development.” However, that subsection explicitly encompasses only “construction . . . within existing zoning entitlements” and “development within, or adjacent to, the unincorporated towns of the delta, as permitted in . . . the general plan of Yolo County, authorized prior to January 1, 1992.” Pub. Resources Code § 29723(b)(9) (emphasis added).

³ The Attorney General noted, however, that “this does not mean that the Commission is totally without recourse to address situations where the Primary Zone boundaries, as shown on that map, seem clearly erroneous or illogical.” *Id.* Specifically, the Commission “may formally request the Legislature to correct the problem(s) by amending the Delta Protection Act to make the necessary, technical changes to the boundaries of the Primary Zone.” *Id.*

First, the Old Sugar Mill Project site is not within a zoning entitlement existing at the time the Act was adopted. Rather, the area was zoned “Industrial” for agricultural purposes. *See* 1982 Clarksburg General Plan, Map 5 (Exhibit J hereto). It was later zoned M-2, “Heavy Industrial.” Indeed, the County found it necessary to rezone the area to “Old Sugar Mill Combining Zone” on October 24, 2006 to allow the Project to go forward. *See* “Ordinance of the Board of Supervisors of Yolo County Creating the Old Sugar Mill Specific Plan Zone and Rezoning the Land Included Therein” (adopted Oct. 24, 2006).

Neither is the Project “development . . . authorized prior to January 1, 1992.” The Old Sugar Mill Project was authorized by Yolo County ten days ago. Thus, County Counsel must resort to a convoluted interpretation of the statute to justify approval of the Project. According to the RDEIR:

Because the Yolo County General Plan, as of January 1, 1992, reserved the Clarksburg [Old Sugar Mill Specific Plan] area for urban development, County Counsel reads section 29723, subdivision (b)(9), to provide that, so long as some sort of development was contemplated in this area as of the beginning of 1992, any development within the area is not subject to the consistency provisions of the Delta Protection Act.

RDEIR at 2.1-66. But the plain words of subsection 29723(b)(9) say nothing of the sort. This subsection does not create an exemption for any sort of development at the Primary Zone project site just because the general plan “contemplated” some sort of development for this area in 1992. Rather, it clearly and narrowly exempts only development that was permitted in the general plan and authorized as of January 1, 1992. County Counsel’s attempt to transmute the word “authorized” into “contemplated” is precluded by the well-established principle of statutory construction that words in a statute be given their plain meaning. *See, e.g., Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal. 4th 222, 227. Simply put, “authorized” does not mean “contemplated.”

County Counsel’s suggestion that the phrase “authorized prior to January 1, 1992” in Section 29723(b)(9) modifies “general plan” rather than “development” must be rejected. First of all, such a reading is inconsistent with the simple grammar of the sentence. The reference to “general plan” is clearly offset in a clause separated from the references to both “development” and “January 1, 1992,” indicating that the 1992 cut-off date refers to “development” (also outside the offset clause), rather than anything within the offset clause. Moreover, counties *adopt*

general plans; they do not “authorize” them. On the other hand, local governments routinely authorize development, *i.e.*, grant other parties the authority to pursue the development. At the risk of belaboring the obvious, the Old Sugar Mill Specific Plan was neither authorized nor even “contemplated” in 1992, since the Old Sugar Mill processing plant did not even close until 1993. RDEIR 2.1-3.

B. The Delta Protection Act Mandates that Development be Approved Only If Consistent with the Act and Resource Management Plan, a Requirement the Old Sugar Mill Project Fails to Meet.

Because the Old Sugar Mill Project lies within the Primary Zone of the Delta and constitutes “development” within the meaning of the Delta Protection Act, approval of the Project and associated actions of the County must not be “inconsistent with the resource management plan, the approved portions of local government general plans that implement the resource management plan, or this division.” Pub. Resources Code § 29770(a). *See also id.* at § 29700 (defining “[t]his division” as the Delta Protection Act), § 29763.5(a) (requiring development to be consistent with the Resource Management Plan).

Here, the Old Sugar Mill Project conflicts with numerous provisions of the Resource Management Plan adopted by the Delta Protection Commission in 1995, the Yolo/ Clarksburg general plan approved by the Commission as consistent with the Resource Management Plan, and the development approval criteria of the Act found in Section 29763.5.⁴ As emphasized in the regulations adopted by the Delta Protection Commission to implement the Resource Management Plan, “[t]he term ‘shall’ in these regulations is mandatory.” 14 Cal. Code Reg. § 20030(b). *See also* Resource Management Plan at 2. Consistency with each of the provisions set forth below is therefore mandatory. On these grounds, as elaborated below, NRDC appeals the County’s approval of the Project.

1. The Old Sugar Mill Project Includes Wholly New Sewage Treatment Facilities in Violation of Utilities and Infrastructure Policy P-3.

Utilities and Infrastructure Policy P-3 of the Resource Management Plan directs that: “New sewage treatment facilities (including storage ponds) and new areas for disposal of sewage

⁴ Land Use Policy P-5 of the Resource Management Plan requires that “[l]ocal general plans shall address criteria under which general plan amendments in the Primary Zone will be evaluated under Public Resources Code Section 29763.5.” Resource Management Plan at 9; 14 Cal. Code Reg. § 20060(e). As the Commission has observed, the County has failed to comply with the provision in approving the Old Sugar Mill Project. Exhibit I at 2.

effluent and sewage sludge shall not be located within the Delta Primary Zone.” Resource Management Plan at 5; 14 Cal. Code Reg. § 20050(c). In direct defiance of the plain language of this provision, the Old Sugar Mill Project includes the construction of a new “septic tank effluent pump” system and a new “shallow subsurface drip dispersal field” for subsurface disposal to process the estimated 90,000 gallons of wastewater generated per day. Specific Plan at 3-14, 16.

The County does not dispute that new sewage treatment facilities and effluent disposal areas are disallowed by the Act. Rather it attempts to argue that the Project facilities and disposal areas are not new. It notes that the former sugar mill located at this site had a pond system for disposing of waste water from the sugar refining process. FEIR Response to Comments Document (“RTC”) at E-10, AAA-4. But, as the Commission observed in its October 25, 2004 letter to the County, “th[is] site . . . was used for disposal of materials directly related to the processing of sugar beets; the site was not used for disposal of treated sewage.” See Exhibit H at 3. The County also points to the fact that “the existing site buildings [associated with a winery now located on the site] are served by a septic tank and leach field.” See Specific Plan at 3-14. However, the Specific Plan is not proposing to use the existing septic tanks or leach field; instead, it calls for the construction of a new, centralized system consisting of new clustered septic tanks, a new “septic tank effluent pump” system, and a new “shallow subsurface drip dispersal field.” *Id.* at 3-14 – 3-17.

As the County itself concedes in the final Specific Plan, the Project system is entirely distinct from existing systems:

As soon as the new wastewater system is operational, the existing septic tank and leach field will be abandoned and wastewater from the existing site buildings will be piped to the new wastewater treatment and disposal facility.

Id. at 3-14 (emphasis added). As such, the Project system is flatly prohibited by the Resource Management Plan and is therefore in violation of the Act.⁵

⁵ The County should note that, if the Project were using an existing sewage infrastructure, which it clearly is not, it would then be in violation of Utilities and Infrastructure Policy P-2, 14 Cal. Code Reg. § 20050(b) (“Independent treatment facilities shall be monitored to ensure no cumulative adverse impact to groundwater supplies”). See Exhibit I at 2; Letter of Russell E. van Loben Sels to Yolo County Planning Commission (Sept. 25, 2006) (Exhibit K hereto).

2. The Project Authorizes New Urban Development and New Infrastructure in the Primary Zone in Violation of Land Use Policies P-2, P-3 and P-4 and Agricultural Policy P-4.

The Delta Protection Act declares “agricultural lands located within the Primary Zone should be protected from the intrusion of nonagricultural uses.” Pub. Resources Code § 29703(c). As the Delta Protection Commission has explained, the Delta Protection Act “was passed by the Legislature in recognition of the increasing threats to the unique and fragile resources of the Delta Primary Zone from potential urban and suburban encroachment having the potential to impact agriculture, wildlife habitat, and recreation uses.” Exhibit I at 1. In its discussion of land use within the Delta, the Resource Management Plan states that “[i]n the Primary Zone, County General Plans and zoning ordinances all designate the Primary Zone primarily for agriculture” and that “this Plan seeks to retain the existing land use patterns in the Primary Zone.” Resource Management Plan at 6 (emphasis added).

In accordance with the goals of the Delta Protection Act, the Resource Management Plan includes numerous requirements designed to protect agricultural land from residential development. Agriculture Policy P-4 provides that “[l]ocal governments shall support long-term viability of commercial agriculture in the Delta because of its economic and environmental importance to the State and local communities.” 14 Cal. Code Reg. § 20070(d). Similarly, Land Use Policy P-2 requires that:

Local government general plans . . . and zoning codes shall continue to strongly promote agriculture as the primary land use in the Primary Zone County plans and general ordinances may support . . . lot splits with no increase in density and clustering to support [the] long-term agricultural viability and open space values of the Primary Zone. Clustering is intended to support efficient use of agricultural lands, not to support new urban development in the Primary Zone.

Id. at § 20060(b) (emphasis added).

While the County asserts that the Old Sugar Mill Project is designed “to provide a compatible expansion of the existing neighborhood,” Specific Plan at 2-4, the proposed levels of development represent a significant departure from the “existing land use pattern” of the Clarksburg community as understood by both the Delta Protection Commission and the community of Clarksburg itself, when both the Delta Protection Act and the Resource Management Plan were enacted. In its 1994 analysis of existing land use prescriptions in the Clarksburg General Plan, contained in a background report prepared to assist the Commission in

developing the Resource Management Plan policies, Commission staff concludes that “no significant intensification of commercial and residential land use is proposed” for this area.⁶

Indeed, the guiding principle of minimal residential growth for the area is echoed throughout the 1982 General Plan, in effect until recently, beginning in the Foreword to the document. *See, e.g.* 1982 Clarksburg General Plan at ii (“Faced with the potential problems that would come with growth, this community has determined to stabilize its size and configuration to present standards”) (Exhibit L); *see also id* at III-1 (“This Plan provides policies that will allow only replacement and infill of commercial and residential uses. *No significant rise in density or population numbers will result*”) (emphasis added). Until the County approved the Old Sugar Mill Project, Clarksburg land use and infrastructure planning has consistently and specifically rejected the type of infrastructure and intensity and density of development required by this project, requiring individual above-ground septic systems due to high groundwater tables. *See* Memorandum of Aramburu to Commission (September 10, 2004) (Exhibit M hereto). Commission correspondence notes that well beyond these dates, in fact, right up to the 2006 approval of the Project, the Clarksburg General Plan required a minimum single family residential lot size of one acre in order to ensure low-density, agriculturally compatible residential patterns in the Clarksburg area. *Id.* As Senator Johnston recently noted: “For 14 years urban sprawl has proceeded rapidly to consume Delta lands in the Secondary Zone, but until now no project has threatened to invade the Primary Zone.” Letter of Patrick Johnston to Yolo County Planning Commission (Dec. 6, 2005) (Exhibit F).

This Old Sugar Mill Project consists of an extensive urban development of 106 single family residential units on 13.8 acres (amounting to lot sizes of only 0.13 acre), 35 cluster residential units on 2.4 acres, and 21 cottage residential units on 2.7 acres. Specific Plan Table 2-1 at 2-5. The Project runs directly counter to Land Use Policy P-2 by dramatically increasing even the 2006 development density in Clarksburg and precluding future new and expanded agriculture-related industrial uses of the land. Also, such “clustering” is allowed in the Primary Zone only “to support efficient use of agricultural lands,” which this Project clearly does not. Further, as noted by Senator Johnston, if this Project goes forward, “it is inevitable that other urban development projects will be pursued in the Primary Zone.” Exhibit F.

⁶*See* Background Report on Land Use and Development (January 1994) (Exhibit J) at 20.

It is also difficult to comprehend how the urbanization of a rural area as described above can be said to support the long-term viability of commercial agriculture in the Delta as mandated by Agriculture Policy P-4. Quite the contrary, the development of the Project site with non-agricultural residential development will necessarily limit any future expansion of adjacent farmlands to the immediate north and west of the Project site. *See* Specific Plan at 1-2. It will also increase pressures to allow more such development in the immediate vicinity, as well as in similar agricultural-related industrial sites in the Primary Zone.

It is not surprising that, in commenting on the Old Sugar Mill Project DEIR, the Delta Protection Commission questioned “the overall concept of modifying the proposed development of the site from Heavy Manufacturing that was historical[ly] directly related to the agricultural crops of the surrounding Delta region, to [a] Special Plan that focuses on residential (a use prohibited under the M-2 zoning), commercial, industrial, office, hospitality public, and waterfront and open space uses.” Exhibit H at 4. It further noted its considerable concern that:

While the [existing] winery and associated crushing and associated wine grape processing appears to support local agriculture, other proposed uses do not. The County should determine if this site is developed for residential and other non-agricultural related businesses, whether there would be a need in the future to convert ag lands to ag support industry sites.

Id. In its October 10, 2006 letter to the County, the Yolo County Farm Bureau voiced similar concerns over potential conflicts between agricultural and residential interests, concluding that “the Old Sugar Mill Specific Plan includes too many houses and does not protect the viability of the new winery and any future agricultural facilities that could be located there.” *See* Exhibit N. Clearly, the Old Sugar Mill Project does not “support efficient use of agricultural lands,” but rather “support[s] new urban development in the Primary Zone,” in violation of Land Use Policy P-2, as well as Agriculture Policy P-4.

In order to prevent just this type of development, the Delta Protection Commission included in the Resource Management Plan Land Use Policy P-4, requiring that: “New non-agricultural residential development in the Primary Zone, if needed, shall be located in the existing Primary Zone communities where support infrastructure and flood protection are already provided.” Once again, the Project directly conflicts this mandate.

First and foremost, Yolo County has never demonstrated that the Project as approved is “needed.” The Commission pointed out that “[t]here are thousands of acres in the Secondary

Zone that are suitable for dense development – areas with appropriate levels of flood control, access to transportation corridors, and proximity to urban services and infrastructure.” Exhibit H at 3. Never does the County justify a need for this degree of development and urbanization in the Primary Zone or explain why it cannot be located in the Secondary Zone.

In any event, it is undisputed that neither the Project site nor the community of Clarksburg currently provide adequate sewage, water supply, or transportation infrastructure to accommodate the level of development called for by the Project. In response to concerns over the necessary new sewage infrastructure, the County acknowledges that “without some [new] system of centralized wastewater treatment, it is infeasible to develop the [Project site] except at the lowest density and intensity.” See RTC at E-11. But, of course, that was the very result the Commission intended to promote by including the existing infrastructure requirement in its Resource Management Plan. It is also a result formerly embraced by Clarksburg itself; its 1982 General Plan “specifically avoids recommending a central sewer system in order to specifically limit the kinds, number and intensity of allowed land uses” in order to promote agriculture and protect Delta resources from urban encroachment. See Exhibit L at III-1.

Similarly, the two active wells currently on the Project site are insufficient to meet the water infrastructure demands of the proposed Project. As the County explains: “The two active wells are currently producing a combined flow of approximately 1,000 gallons per minute. . . . The [new] water system will be designed to deliver the larger of the following demands: peak hour demand (360 gpm), or maximum daily demand plus fire design demand condition (2,180 gpm) . . . Potable water supply will be provided by . . . new well(s), as needed . . . Water storage facilities are planned to provide peaking demands to the system as well as fire protection demands.” See Specific Plan at 3-9 – 3-10 (emphasis added).

Even the existing system of transportation infrastructure is inadequate for the proposed Project. The County details plans for expansion of a circulation system that cannot by itself adequately serve the new residential areas: “[E]xisting street systems in the area will be utilized as well as new streets . . . Local streets in the residential area will be designed to accommodate the extension of School Street, north of Clarksburg Road, to provide a direct interior street linkage.” Specific Plan at 3-2 (emphasis added). As noted by the California Department of Transportation in its December 19, 2005 letter commenting on the RDEIR, even the most essential support infrastructure – emergency services – is inadequate in the Project area for the

level of development proposed. *See* Exhibit O at 2 (residential areas of the project are “far removed from emergency services” and the EIR does not include emergency evacuation routes in case of flooding).

Finally, the Old Sugar Mill Project conflicts with Land Use Policy P-3, which directs:

New residential, recreational, commercial, or industrial development shall ensure that appropriate buffer areas are provided by those proposing new development to prevent conflicts between any proposed land use and existing agricultural use. Buffers shall adequately protect [the] integrity of land for existing and future agricultural uses. Buffers may include berms and vegetation, as well as setbacks of 500 to 1,000 feet.

14 Cal. Code Reg. § 20060(c). The Project’s 300-foot setback “requirement” – which can be waived by the adjacent property owners – has been questioned by Commission staff, the Farm Bureau and others as inconsistent with Land Use Policy P-3. *See, e.g.* DEIR at 4.1-6; Exhibit N (Farm Bureau). The Commission has underscored the need for “additional analysis about the appropriate size of any needed buffers” around the Project. Exhibit H at 5. It advised the County that “[t]he existing agronomic practices on nearby agricultural lands should be considered, and after consultation with an agronomic expert or the County Ag Commissioner, a buffer should be incorporated on the project site to ensure that there will not be conflicts between the existing ag and any proposed uses.” *Id.* By way of example of such potential conflicts, the Commission notes that as many vineyards are harvested at night, the buffer between the vineyards and residences will likely “need to be wide, and include a berm and landscaping to minimize intrusion of dust, noise, and lights associated with night harvesting.” *Id.*; *see also* Exhibit N (Farm Bureau expressing similar concerns).

In short, as the Delta Protection Commission has stated with respect to the Old Sugar Mill Project, “[t]he Delta Protection Act and the Commission’s . . . [Resource Management] Plan do not support “leapfrog” urbanization in the Primary Zone, particularly if that development would or could adversely impact the existing Delta communities and the regional agricultural economy.” Exhibit H at 3.

3. The Project Exposes the Public to Increased Flood Hazard In Violation of Levee Policies P-1 through P-5.

The Delta Protection Act prohibits any development in the primary zone that “will . . . expose the public to increased flood hazard.” Pub. Resources Code § 29763.5(g). Consistent with this goal, the Resource Management Plan includes five mandatory Levee Policies, all

relating to the critical issue of protecting human life, property, historic structures, wildlife habitat, and other Delta resources from levee failure and flooding. *See* Resource Management Plan Levee Policies P-1 – P-5; 14 Cal. Code Reg. § 20100(a)-(e). As tragically illustrated by Hurricane Katrina, and well demonstrated in the burgeoning body of research examining the regional impacts of anticipated climate change,⁷ this is an issue of pressing importance for the Delta.

There is well-justified and widespread concern that the Delta levee system, and particularly the levee abutting the project site, is inadequate to protect even existing development. The County admits that the risk of levee failure in the Project area is “unavoidable.” Special Plan at MMP-35. It further acknowledges:

[G]iven uncertainties regarding the Sacramento River levee system’s performance during a modeled 100-year flood event . . . the project site’s 100-year flood certification is in question. . . . As a consequence, the location of residential housing and commercial structures under the Project could well be within a potential 100-year flood hazard area.

RDEIR at 2.4-40. Yet the County proceeded to approve the Project without first obtaining and considering the results of a geotechnical study that will resolve this crucial issue. Specific Plan at MMP-36.

Moreover, the developer is under no obligation to obtain 100-year flood certification, as provided under federal guidelines for development in floodplains. *Id.* *See also* Letter from Natural Heritage Institute to County (Oct. 19, 2006) (Exhibit T); Letter from California Representative Lois Wolk to County (Oct. 6, 2006) (Exhibit U). Even if future the geotechnical study reveals “conditions of concern with regard to stability or seepage,” the Project developer is required only to implement those improvements needed to resolve these conditions determined to be “feasible” and contingent on available funding. Specific Plan at MMP-36. Because funding for improvements to the levees is entirely unsecured, it is likely that the feasibility determinations will be heavily weighted to economics. *Id.*

⁷ *See, e.g.,* California Department of Water Resources, Technical Memorandum Report, *Progress on Incorporating Climate Change into Planning and Management of California’s Water Resources* (July 2006), available at <http://baydeltaoffice.water.ca.gov/>. *See also* Exhibits P-S (recent independent and California Department of Water Resources studies describing the increased risks that global climate change portends).

The Project's proposal for increased urbanization of a Delta floodplain susceptible to such risks, without binding mitigation achievable through secured funding, is in direct conflict with Levee Policies P-1 ("Local governments shall ensure that Delta levees are maintained to protect human life, to provide flood protection, to protect private and public property") and P-2 ("[L]ocal governments shall adhere to guidelines for federal and local levee maintenance and construction"). *See* 14 Cal. Code Reg. § 20100(a), (b).

Similarly, Levee Policy P-3 states that local governments must:

. . . carefully and prudently carry out their responsibilities to regulate new construction within flood hazard areas to protect public health, safety, and welfare. Increased flood protection shall not result in densities beyond those allowed under zoning and general plan designations in place on January 1, 1992, for lands in the Primary Zone.

Id. at § 20100(c) (emphasis added).

Common sense dictates that any adequate analysis of the consistency of the Project with the Levee Policies should take into account the significant increase in risks of major floods and levee failures predicted for the near future as a result of global climate change. This critical topic has not been examined in any depth by the County – not in the EIR, not in County staff reports, and not in any supporting documentation regarding the Project. Levee reinforcements, expansions, and additional maintenance are all likely to be necessary as anticipated sea level rise increases pressure on the levee system; yet the Project's minimum levee setbacks were planned without any consideration of these future conditions. Without adequate analysis of climate change impacts, it is impossible to claim compliance of the Yolo County Board of Supervisors with Levee Policy P-5, which requires local governments to "control levee encroachments that are detrimental to levee maintenance." 14 Cal. Code Reg. § 20100(e).

The bottom line is that the County cannot possibly find that this Project "will not expose the public to increased flood hazard," as mandated by the Delta Protection Act. Pub. Resources Code § 29763.5.

CONCLUSION

For the reasons set forth above, NRDC requests that the Delta Protection Commission set aside Yolo County's approval of the Old Sugar Mill Project and remand the Project to Yolo County for reconsideration.

Respectfully submitted,

Dated: November 3, 2006



Deborah S. Reames

Gregory C. Loarie

Counsel for Appellant
Natural Resources Defense Council